

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ETHEL L. CRAYTON)	
Claimant)	
VS.)	
)	
HCA WESLEY MEDICAL CENTER)	Docket Nos. 162,313
Respondent)	& 172,829
AND)	
)	
SELF-INSURED)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the April 7, 1994, the respondent's application for review of the Award entered by Administrative Law Judge Shannon S. Krysl, dated January 27, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Kendall Cunningham of Wichita, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that listed in the January 27, 1994, Award of Administrative Law Judge Shannon S. Krysl.

STIPULATIONS

The stipulations as listed in the January 27, 1994, Award of Administrative Law Judge Shannon S. Krysl are hereby adopted by the Appeals Board.

ISSUES

This appeal involves two separately docketed claims. The first is for injury on October 11, 1991, and the second on December 11, 1992. Although the Administrative Law Judge also decided other issues, the only decisions challenged on appeal were the decisions regarding nature and extent of disability on each claim and the decision regarding Fund liability. The challenged decisions will be reviewed de novo on the record. The Appeals Board also notes an error in the calculation of average weekly wage which is modified by this Order. The decision and findings by the Administrative Law Judge relating to other issues are hereby adopted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record and consideration of the arguments of the parties, the Appeals Board finds, for the reasons stated below, the claimant sustained a twenty-four percent (24%) general body disability as a result of accidental injury arising out of and in the course of her employment on October 11, 1991. The Appeals Board also finds that the second injury, the one on December 11, 1992, caused only temporary aggravation with no additional permanent disability. Finally, the Appeals Board finds the respondent has not proven liability of the Kansas Workers Compensation Fund.

Claimant has a twelfth grade education. She started working at Wesley Hospital at age seventeen, immediately after high school. At the time of her accident in October 1991 she had worked there as a nurse's aide for approximately eight years.

The first accident at issue occurred on October 11, 1991. Claimant injured her low back on that date helping a patient to the restroom. She was thereafter treated by Dr. Sparks with referrals to Dr. Mills and Dr. Klufta. Although it appears Dr. Sparks released her to return at an earlier date, claimant did not return to work until December 1992. On December 11, 1992, claimant suffered the second injury to her low back, again assisting in the lifting of a patient.

The evidence presented includes expert medical evaluations of claimant's impairment after the first accident but before the second as well as evaluations after the second accident. In deciding how the various opinions should be considered, it is helpful to first determine whether the second accident caused additional permanent injury.

On review of the evidence, the Appeals Board finds that the second accident caused temporary aggravation only. Claimant has not proven additional permanent disability. Claimant testified that the pain did not change after the second accident and that she had no new complaints after the second accident. Dr. Mills, who saw her both before and after the second accident, testified that he did not know whether the second accident caused any permanent aggravation. Dr. Sparks also indicates he cannot give an opinion that the second accident caused additional disability. Only Dr. Schlachter, who did not see the claimant after the second accident, gives an opinion that the second accident created additional disability. He does so on the basis of a comparison between an MRI study report and a CT scan record. He acknowledges these are two different types of tests. In light of the other testimony in the case, the Appeals Board concludes that this testimony by Dr. Schlachter does not prove claimant suffered disability from the second accident.

The various medical opinions regarding claimant's permanent impairment, including those based on an examination done after the second accident, are therefore viewed as evaluating the nature and extent of disability from the first accident, i.e. the accident of October 11, 1991. The evidence to be evaluated includes claimant's testimony as well as the testimony of four physicians and two labor market or vocational experts.

After the October 11, 1991 accident, claimant was treated primarily by Dr. Sparks, a Wesley Hospital physician. Dr. Sparks' records and testimony indicate initial findings of chronic low back strain with possible radiculopathy. He also notes some findings suggestive of facet joint involvement. He prescribed medication, exercise and physical therapy.

In January 1992 Dr. Sparks referred claimant to Dr. Klufta for evaluation. Dr. Klufta determined that claimant was not, in his opinion, a surgical candidate and recommended epidural injections. By March 1992, Dr. Sparks noted it would be unreasonable for her to continue as a nurse's aide. In April 1992, he recommended restrictions which included no frequent or prolonged bending or stooping and no lifting over thirty-five (35) pounds maximum or twenty (20) pounds on a frequent basis. At that time, he scheduled claimant for an IME with Dr. Mills.

The initial purpose for the referral to Dr. Mills was to determine if further therapy would be appropriate. At that time Dr. Sparks expected to provide a rating and give restrictions after the examination by Dr. Mills. Dr. Mills saw the claimant several times. He initially concluded there was a possible herniated disc. However, because of her improvement after physical therapy he concluded, as of August 17, 1992, that there was

some symptom magnification. Dr. Mills testified that by symptom magnification he did not mean malingering and could not say whether it was conscious or unconscious.

There is a notable change in Dr. Sparks opinions after the referral to Dr. Mills. He thereafter also states in his records that there is evidence of symptom magnification. As of October 9, 1992, he released claimant to work without restrictions. Dr. Sparks also saw claimant on December 15, 1992, after the second accident. He stated again that he felt she would be able to return to her regular work. In his deposition testimony Dr. Sparks does agree with Dr. Mills that there is some permanent disability from her accident of October 11th. He agrees with Dr. Mills' assessment that there is a one percent (1%) permanent partial disability.

Dr. Eyster treated the claimant after the second accident from March 3, 1993 through May 7, 1993. He diagnosed a lumbar strain superimposed on degenerative disc disease and rated her impairment at five percent (5%) of the body. He felt she should not do repetitive lifting over twenty (20) pounds or single lifting over thirty (30) pounds and should not do repetitive bending or twisting. Based upon an MRI showing a bulging disc, he ultimately concluded there was a five percent (5%) impairment. Although her subjective complaints were not, in all cases, consistent with the MRI results, he testifies that the MRI results gave some relevance to her subjective complaints.

Dr. Schlachter saw the claimant on October 7, 1992, before the second accident. He reviewed the MRI report showing a bulging disc at L-5. According to Dr. Schlachter's testimony, a myelogram and CT showed similar findings. He agreed that there is a symptom magnification or a psychogenic overlay. He also agreed that the MRI results would not justify the extent of her complaints. He rated claimant's disability as five percent (5%) permanent partial impairment and recommended restrictions. Specifically, he recommended no repetitive lifting over thirty-five (35) pounds or no single lift over forty-five (45) pounds and no repetitive bending, twisting or working in awkward positions.

From the restrictions of Doctors Eyster and Schlachter, Karen Terrill and Jerry Hardin testified regarding the effect claimant's injury would have on her ability to earn a comparable wage and to obtain employment in the open labor market. Jerry Hardin testified that based upon Dr. Eyster's restrictions there is a seventy to seventy-five percent (70-75%) loss of ability to perform work in the open labor market. In his opinion, from Dr. Schlachter's restrictions, she has a sixty percent (60%) reduction of ability to perform work in the open labor market. He also opines that her loss of ability to earn a comparable wage is twenty-three percent (23%) based upon a comparison of what he understands to be a \$259.00 per week pre-injury wage to her projected \$200.00 per week post-injury wage.

Karen Terrill first states that based upon Dr. Mills' and Dr. Sparks' opinions claimant has no loss of ability to earn comparable wage and no loss of ability to obtain employment in the open labor market. Based upon Dr. Eyster's restrictions, it was her opinion that claimant has a forty-one percent (41%) loss of ability to perform work in the open labor

market, and based upon Dr. Schlachter's restrictions there would be a fourteen percent (14%) loss. She also gives an opinion as to the effect of the injury if one were to assume that the second injury added permanent disability. This opinion assumes that Dr. Schlachter's restrictions are appropriate for the first injury and Dr. Eyster's added restrictions result from permanent disability from the second accident. From this analysis, she concludes that there would be a thirty-one percent (31%) loss of access to the open labor market from the first injury and an additional ten percent (10%) resulting from the second. In her opinion, claimant has a seven percent (7%) loss of ability to earn comparable wage. Her wage calculations assume a \$6.50 post-injury wage compared to what she understands was a \$6.96 per hour pre-injury wage.

From the evidence presented, the Administrative Law Judge concluded it was appropriate to give equal weight to the evaluations of the physicians and labor market experts. For the reasons stated below, the Appeals Board considers this general approach to be appropriate in this case. There are, however, adjustments which the Appeals Board also believes are necessary.

The Administrative Law Judge found claimant's average weekly wage to be \$282.05. The Appeals Board finds that claimant's average weekly wage was \$307.68. At the time of her accident on October 11, 1991, claimant was earning \$6.43 per hour. Her average base rate was therefore \$257.20 per week. Her average overtime, which is to be added, was \$4.12 for the twenty-six (26) weeks preceding the date of her accident. The Administrative Law Judge has, in addition, added the holiday and vacation pay. The Administrative Law Judge has not, on the other hand, added the value of life insurance, retirement and health insurance benefits. K.S.A. 44-511 defines the additional compensation which may be added to calculate the average weekly wage. The statute does not contemplate the addition made by the Administrative Law Judge for vacation time or holiday time. The health insurance, life insurance and disability are, on the other hand, expressly required to be added. The evidence in this case indicates the health insurance policy had a monthly value at the time of the accident of \$128.47. This converts to a weekly value of \$29.64. The life insurance policy appears to have had a fifty-three cent per week value. The retirement account paid 6.5% of wages paid. Based upon her weekly base rate of \$257.20, the retirement benefit would therefore have a weekly value of \$16.72. The total wage would, therefore, be \$307.68 which combines the base wage, overtime, health insurance, life insurance, and pension plan. The value of holiday pay and vacation pay is not added.

The Appeals Board finds the general approach followed by the Administrative Law Judge to be otherwise appropriate because it appears first that the opinions of Dr. Sparks and Dr. Mills understate claimant's disability. Their examinations did reveal positive findings which led them initially to believe that claimant had a herniated disc. Their later conclusion that claimant was magnifying the symptoms does not, in our opinion, justify the complete reversal nor does it erase completely the positive findings and evidence of

disability. As noted by both Dr. Eyster and Dr. Schlachter, the positive MRI findings give credibility to some but not all of her subjective complaints.

On the other hand, it appears reasonable not to rely solely on Dr. Eyster and Dr. Schlachter. Certainly, Dr. Sparks and Dr. Mills had the opportunity to examine claimant over a more extended period of time. It was that extended opportunity to examine and evaluate claimant that led them to their finding of symptom magnification. They had, as did Dr. Eyster and Dr. Schlachter, initially given greater credibility to claimant's complaints. Doctors Eyster and Schlachter, on the other hand, had the benefit of this history of examination and treatment by Doctors Sparks and Mills. The Appeals Board considers it appropriate to weigh the opinions of Dr. Mills and Dr. Sparks that claimant has no restriction and, treating them as a single opinion, give it equal weight with the opinions of Dr. Schlachter and Dr. Eyster.

There also appears no compelling reason to give greater weight to either Karen Terrill's or Jerry Hardin's opinions in this case. Their opinions do, however, require adjustment based upon the claimant's average weekly wage. When the average weekly wage of \$307.68 is compared to Karen Terrill's projected post-injury of \$260.00 per week, the result is that claimant would have a fifteen percent (15%) loss of ability to earn comparable wage. When Mr. Hardin projected \$200.00 per week post-injury wage is compared to the \$307.68 pre-injury wage the result was a thirty-five percent (35%) loss of ability to earn comparable wage.

Giving equal weight to the various opinions, the Appeals Board finds a seventeen percent (17%) loss of ability to earn a comparable wage. Giving equal weight to the opinions of the physicians and the resulting opinions by the two vocational experts on loss of access to the open labor market, the Appeals Board finds that claimant's loss of access to the open labor market is thirty-one percent (31%).

The Appeals Board finds it appropriate in this case to weigh equally loss of access to the open labor market and loss of ability to earn comparable wage as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). Accordingly, the Appeals Board finds that claimant has a twenty-four percent (24%) general disability as a result of her accidental injury on October 11, 1992.

The evidence fails to establish liability of the Kansas Workers Compensation Fund because the only evidence relating to the Fund liability is the opinion of Dr. Schlachter. He does give an opinion that the second injury would not have occurred but for the first. However, he did not see the claimant after the second injury. The Appeals Board has, as indicated above, determined not to accept Dr. Schlachter's opinion that the second injury caused additional permanent disability. The mechanism of the second injury appears competent to cause a temporary low back injury without the disability from the first injury. The Appeals Board cannot, under the circumstances, accept his opinion as proof of

Workers Compensation Fund liability. The award is, therefore, to be paid by the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 27, 1994, should be and hereby is modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ethel L. Crayton, and against the respondent, Wesley Medical Center, a qualified self-insured, for an accidental injury sustained on October 11, 1991.

The claimant is entitled to 54.86 weeks temporary total disability based on an average weekly wage of \$307.68 at the rate of \$205.13 per week or \$11,253.43, followed by 360.14 weeks at \$49.23 or \$17,729.69, for a 24% permanent partial general body disability, making a total award of \$28,983.12.

As of September 9, 1994, there would be due and owing to claimant 54.86 weeks temporary total compensation at \$205.13 per week in the sum of \$11,253.43 plus 97.28 weeks permanent partial compensation at \$49.23 per week in the sum of \$4,789.09 for a total due and owing of \$16,042.52 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$12,940.60 shall be paid at \$49.23 per week for 262.86 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Barber & Associates

Transcript of preliminary hearing

\$91.40

Transcript of preliminary hearing

84.50

Transcript of regular hearing	206.70
Deposition of Robert L. Eyster, M.D.	133.00
Deposition of Jerry D. Hardin	250.00

Deposition Services

Deposition of Philip R. Mills, M.D.	\$208.60
Deposition of Ernest R. Schlachter, M.D.	203.80
Deposition of Stephen T. Sparks, M.D.	176.80
Deposition of Karen Crist Terrill	253.20

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, PO Box 47370, Wichita, KS 67201-7370
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, KS 67202
Kendall Cunningham, 125 N. Market, Suite 1416, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director